No. 283

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

AUTHORITIES CITED

Cases:

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, James Victor Salem, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed June 9, 1961, and the denial of a petition for rehearing, without opinion, filed June 21, 1961, reversing a final judgment entered in the United States District Court for the Southern District of New York on December 9, 1960 on a general jury verdict based on negligence under the Jones Act (46 U. S. C. 688) and/or unseaworthiness, and an award of future maintenance by the Court. The award for past maintenance was affirmed and is not a part of this petition.

The opinion of the Court of Appeals, made a part of the appendix to this petition, with a dissenting opinion by J. J. Smith, *C.J.*, are not yet officially reported. There was no opinion by the trial Judge, W. W. Ritter, *D.J.*

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on June 9, 1961.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254(1) and 2101, as well as Rules 19(b) and 20 of the Rules of this Court. The Jones Act (46 U. S. C. 688) was the basis for federal jurisdiction in the Court of first instance.

Questions Presented for Review

I

Should a general verdict for a seaman by a jury in a Jones Act case be set aside where the majority opinion concedes there was evidence sufficient to support it, but predicates reversal on the absence of testimony by an expert on naval architecture with respect to the obvious danger of an unprotected deep opening in a vessel at sea, not involving any complex or technical details beyond the ken of a lay juror?

Fairly comprised in this question are the following:

1. Is there not an obvious invasion of the jury's province to decide an issue of fact pertaining to ordinary standards of conduct of safety and danger?

2. Is there not a dilution of a Jones Act seaman's right to a trial by jury instead of a trial by experts on simple issues of obvious danger?

3. Where there is no testimony by an expert on naval architecture offered by either party at the trial, but there is substantial testimony offered by petitioner with respect to

the obvious lack and need of a railing or other safety device on a platform adjacent to a man-sized opening, supplemented by photographs and diagrams, does not the Court of Appeals invade the trial Court's function to decide whether there is need for an expert?

4. Is there not a violation of petitioner's rights under the Seventh Amendment to the Constitution?

5. Is testimony by an expert on naval architecture with respect to the need for, or the feasibility of construction of a railing or safety device, necessary to support an instruction to the jury that a verdict for the plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices," related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members, supplemented by photographs and diagrams, clearly demonstrated the absence and need of a railing or guard line?

6. The dissenting opinion points to the majority's improper invasion of the jury's fact-finding function, relating it to a clearly erroneous blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony" (p. 11a of appendix to petition). The dissent supports petitioner's position that a seaman's rights are diluted if an expert is required where ". . . the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work" (p. 11a of app.).

II

Where the trial Court by consent of the parties passed on the cause for future maintenance and determined from the voluminous medical evidence that petitioner was deserving of a maintenance award for three additional years, was this "clearly erroneous" and justified on a ground expressed in the majority opinion that ". . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 8a of app.)?

Statute Involved

The Jones Act, 46 U. S. C. 688, as follows:

> Recovery for injury to or death of seaman
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

Statement of the Case

Petitioner was caused to sustain permanent injuries inside respondent's radar tower on February 16, 1958, while employed as a lookout able-bodied seaman aboard the SS United States at sea. This enclosed radar tower is described in the majority opinion below as "a hollow aluminum mast" about 65 feet high. The crow's nest plat-

form is within the tower, approximately 31 feet up, reached by the use of a vertical ladder, at which point a man-sized opening must be crossed. As further described in the dissenting opinion below, "The straight ladder ascending the radar tower faced 180 degrees away from the platform leading to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around" (p. 10a of app.).

At the time of the accident there were five ordinary household light bulbs within the tower, at intervals one above the other. The two bulbs above the crow's nest platform that would have cast illumination thereon had been out of commission for several months. The two bulbs below the crow's nest platform were also unlit and had been the subjects of attempted but unsuccessful repair several days before. The relationship of the remaining light to the accident at the crow's nest platform, which was shown to be smooth and worn, without any railing or life-line, is described in the majority opinion, as follows:

> "Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform" (p. 3a of app.).

The second incident where Richards, a fellow seaman, negligently attempted a rescue by leaving the dazed peti-

tioner in total darkness on a narrow ledge, feet dangling down in the 31 foot hole, thereby falling again, is resolved by the entire panel below in petitioner's favor. The majority below concedes this alone would have supported the judgment for petitioner had there been a special finding. Because there was no request for special interrogatories the Court and parties relied on a general verdict. The majority reversed the general verdict, though conceding it was amply supported by proof of negligent rescue and on the issue of inadequate illumination, as follows:

> "As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (pp. 8a, 9a of app.).

Reversal was predicated on an instruction by the trial Judge that a verdict for plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices" (p. 4a of app.). The basis for reversal was "There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to the crow's nest" (pp. 4a, 5a of app.).

The petition for rehearing referred to the testimony of witnesses as to the lack of and need for a railing or guardline on the platform and the inadequacy of the large radar casing used as a support to swing over from the ladder to the platform. This was buttressed by decisional authorities that clearly established the principle that the

absence of any protective device about an opening aboard ship, particularly at sea, was a matter of fairly obvious potential danger. Petitioner also contended that the lack of a railing, hand-hold or guard line was not so complex and beyond a lay juror's ken that an expert's testimony should be allowed to displace a part of the jury's independent fact-finding function. Again Judge Smith dissented from the denial of the petition for rehearing without opinion.

The overall significance of the error by reversal of the general verdict, gravely adverse to the statutory and decisional rights of seamen, "wards of the admiralty", as well as all future juries which heretofore enjoyed a respected function in Jones Act suits, is strikingly apparent in the instant record of multiple breaches by respondent of its elementary obligations to a seaman. Neither opinion below sets forth the full picture of all the dangers and conceded failures to act by officers and crew members. Petitioner contended that his motion at the close of proof for a directed verdict, was eminently proper and should have been granted. In this light the obscure issue of an alleged infirmity in an instruction to the jury on "railings or other safety devices" should be deemed moot. Hereinafter we concisely set forth additional facts as they relate to the questions presented for review.

1. The dangerous and unseaworthy condition of the crow's nest platform:

At the time of the accident the log entries indicate the vessel was rolling and pitching in a rough west northwesterly sea, seven degrees to portside and six degrees to starboard side, the weather overcast with passing rain squalls. The vessel's great speed caused much vibration, particularly transposed to the 65 foot hollow mast encom-

passing the crow's nest. The platform on which petitioner had to step from the ladder was smooth, partly worn away and without any and adequate hand-holds, railings or life-lines. It was not painted with any skid-proof material, and respondent's answers to interrogatories that it had been painted with such material were proven untrue by the testimony of its own witnesses.

The deposition of Trendell Terry, plaintiff's exhibit 19, sets forth the need for a railing or similar device at the crow's nest platform. When he testified he was still employed by respondent, having served with it since 1950, and with the experience of 160 to 186 voyages on the S.S. United States, as a lookout A/B, having used the ladder and platform in question about 88 times each voyage. On page 92 he refers to the smooth and slippery condition of the platform, without any non-skid paint, and further "There certainly should have been a railing or life lines on this platform to grab." He described the large and cumbersome pipe casing as the only handhold available, in the following words:

> ". . . but it's not very convenient because it's so big and round, big and bulky, that you couldn't get a good grip . . . I never use it" (pp. 11 and 12 of deposition).

Terry also confirmed the absence of any life line, its purpose meant to be a "safety measure to grab hold onto to protect yourself until you're safe" (p. 25 of deposition).

Similarly did Louis Tribble, the other A/B lookout testify on the absence of a necessary safety device. His deposition was marked plaintiff's exhibit 18, wherein he recited his extensive marine background, including a rating as a second mate. With respect to the rectangular pipe casing referred to in the majority opinion below, he testi-

fied he never used it as a handhold for the following reasons:

> "A. Well, because I don't ever grab hold of anything that has electrical current going through, plus the fact that it was too big to grab hold of" (pp. 87 and 88 of deposition).

He also affirmed there was nothing on the platform "to grab hold of or to bridge over the space" (p. 23 of deposition).

Richards also testified that there was absent any handholds, rails or lifelines at the crow's nest level, corroborating Salem who testified that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder.

2. The dangerous and unseaworthy condition of the lights within the radar tower:

It was the testimony of Richards, the relief lookout A/B who had rescued petitioner and then negligently left him unattended to fall the second time, that the two upper lights had not been lit for at least two voyages and had they been on they would have illuminated the crow's nest platform. Chief Quartermaster Barton testified that he had previously noted and reported trouble with the radar tower lights to the ship's electrician six days before the accident, and the chief electrician testified that he assigned the second electrician to check "what might be causing lamps to burn out". It is uncontradicted that household bulbs were used, not anti-vibration or "rough service bulbs", thereby requiring the replacement of 500 to 600 burned out bulbs a day during each voyage. The second electrician had replaced the two lower bulbs in the radar tower on February 10, 1958, without checking its adequacy

from that date to the time of the accident, despite knowledge that ". . . the two bottom lights were burning out too often". The two upper lights were left unlit as they had been for several months.

3. The occurrence of the accident by reason of the unseaworthiness and conceded negligence of respondent and its vessel:

After the last light went out to leave petitioner in total darkness, he slipped just after he had released his precarious hold on the bulky radar casing; both hands were then at his side, as he hadn't yet time to extend his arms to reach the sides of the radar tower for whatever makeshift support he may have found by touch alone. Petitioner was compelled in absolute darkness to move away from the edge of the unprotected platform. The only light on went out just as he was carrying his right foot over the 31 foot opening between the up and down ladder and the smooth, partly worn platform, absent any perforations or skid-proof material to allow friction for a secure footing.

4. Petitioner's injuries, hospitalizations, medical testimony and the award for future maintenance:

The 37 year old petitioner had joined the S.S. United States in September, 1956 as an ordinary seaman. Thereafter he was soon promoted to the responsible position of lookout A/B. His several pre-voyage physical examinations while in respondent's employ were unremarkable, and there was no entry produced from any medical log of an illness, complaint or injury prior to February 16, 1958. His superior affirmed a satisfactory work record and that he got along well with the other men. His annual earnings were $5,656.76, a loss of over $15,000.00 to the time of trial.

The terror and trauma of the instant accident produced such profound physical and psychiatric changes that he is permanently unemployable as a seaman and in need of extensive orthopedic and psychiatric treatment, and now undergoing rehabilitation. Respondent's personal injury report synthesized its extensive day by day ship's medical record that was not sent on to the U. S. Public Health Service Hospital, or even shown to its own testifying doctors, as follows:

> "Probable fracture or dislocation of vertebra with spinal nerve injury. Paralysis and anesthesia right leg. Concussion of brain. Sedation, bilateral traction of both legs; hospitalized 16 through 18 of February, '58".

He was transferred by ambulance, tied down in a stretcher, to the U. S. Public Health Service Hospital, Stapleton, S. I., where he remained as an inpatient for extended periods and as an outpatient to the present day. There is noted a "weakness right leg probably due to nerve root irritation, L-5", myofascial disease and a "chronic schizophrenic reaction, undifferentiated type, conversion reaction", as well as a paralysis of the small intestine in the area of the lumbar spine. A September 16, 1960 entry sets forth—"do not believe that this patient will ever be fit for sea duty when back condition and N.P. situation considered together".

Dr. David J. Graubard, a traumatic surgeon, and Dr. Laurence I. Kaplan, a neuropsychiatrist, testified that petitioner was permanently disabled, never again able to return to sea, and suffering from continuing effects of a herniated intervertebral disc and a severe mental condition, traumatically caused. Dr. Kaplan also concluded that the accident prompted a severe post-traumatic reaction which

bordered on or actually was psychotic while he was in the hospital, expressing a prognosis of long disability with the likelihood of improvement remote, and that it may be that petitioner would get worse and require more specific orthopedic or neurosurgical therapy. Certain motion pictures taken of petitioner by respondent's investigators, shown to the Court and jury, clearly depicted his worsening condition over an extended period of time. On all this proof the trial Court granted petitioner three years future maintenance on the basis of $8.00 a day, as follows:

> "The Court: It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the $8 a day."

This was reversed and remanded meaninglessly by the Court below on the following:

> "Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (pp. 7a, 8a of app.).

Reasons for Granting the Writ

The overriding national significance of this case is that it has so far departed from the accepted and usual course of judicial proceedings related to the fact-finding function of a jury as to ordinary standards of conduct of safety or danger on *Jones Act negligence* and unseaworthiness, and a trial Court's determination on the submitted cause for future maintenance, that without the exercise of this learned Court's power of supervision it will remain in conflict with decisions of other panels of the Court of Appeals for the Second Circuit and other Courts of Appeal, as a landmark of retrogression and disregard for the mandate of this Court expressed in prior decisions. The dissent by Chief Judge Clark in *Palermo* v. *Luckenbach Steamship Co., Inc.*, 246 F. 2d 557 (C. C. A. 2d), reversed summarily by this Court at 355 U. S. 20, 78 S. Ct. 1, is equally applicable here, as follows:

> "I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases . . . Today's decision continues that trend, adding some new curiosities." (P. 561 of 246 F. 2d.)

The "new curiosities" in the instant case are strained reasons to support underlying premises against jury verdicts for seamen, on an unjustified concern that in determining questions of negligence juries will fall short of a fair performance of their constitutional function.

On the simple issue of fact related to the need or feasibility of construction of a railing or lifeline on a platform, 31 feet up in an enclosed radar tower, alongside a man-size opening, the majority below ignores the ample testimony for petitioner on the lack of a protective device and the need therefor, but instead requires the unneces-

sary testimony of a naval architect. If required in this case, it will become the *modus operandi* in every subsequent trial where a simple ship's fixture or appurtenance is involved. This will promote the evil of protracted trials, experts pitted against experts, compounding the wrong by an improper invasion of the jury's independent fact-finding function. The use of expert testimony should be sparing, and limited to complex factual issues beyond the lay juror's ken. Respondent did not offer an expert on naval architecture, nor was there any exception recorded by respondent that petitioner was so required to support his contentions on the clear and simple issues involved.

The majority opinion below ignores a basic premise in the use of expert testimony, long ago expressed by this Court in an even more complicated issue on the construction of a patent, in *Winans* v. *The N. Y. and Erie Railroad Co.*, 62 U. S. 88, 21 How. (U. S.) 88, 101, 16 L. Ed. 68 (1858), as follows:

> "Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury; and perplexing instead of elucidating the questions involved in the issue".

Inconsistently, the majority opinion below concedes that the general verdict is supported by substantial proof in the record. A new curiosity is advanced that the jury verdict was not conclusive on all issues raised by the pleadings and submitted to the jury because a small part of the Charge, raised in passing in the briefs below and not even

referred to in oral argument, renders wholly defective a general verdict sought by the parties without a request for special interrogatories.

On the uncontradicted fact that there was a total absence of any illumination at the time of accident, compounded by the prolonged absence of illumination from the upper two lights, a directed verdict for plaintiff on the ground that this condition at the very least contributed to the accident, was necessary and proper. If so, this would make immaterial any error of instruction related to finding liability. See Rule 61, F. R. C. P. on "Harmless Error."

There was sufficient evidence of the need for a railing or other safety device, such as a rope line to guide and protect plaintiff while in complete darkness, for skid-proof paint on the platform proper, or even a flashlight that was not provided, to allow plaintiff to move safely on the platform to the crow's nest.

Finally, and now consistently, the majority opinion set aside the trial Court's determination of future maintenance without mention or regard for his fact-finding function within the framework of the "clearly erroneous" principle expressed by this Court in *McAllister* v. *U. S.*, 348 U. S. 19, 75 S. Ct. 6. This cause is also remanded with the limitation that " . . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure."

Reason and the cases cited hereinafter under specific points unequivocally support petitioner's contention that here is a compelling need for this learned Court to express its humane mandate for seamen as "wards of the admiralty", so that all future Jones Act cases will be resolved on the law expressed by the Supreme Court and not by the "curiosities" in the majority opinion below.

POINT I

To reverse a general jury verdict in a seaman's case because an expert was not called to temper the jury's fact finding function where the compounded danger of an unprotected hole was "fairly obvious" and within a lay juror's experience and ken, is contrary to all decisional authorities on similar issues, and in disregard of this Court's clear and consistent mandate on the inviolable constitutional function of a Jones Act jury.

Any layman is familiar with platforms and ladders. The usual partly inclined ladder or stairway with railings can readily be compared from his everyday experiences with a vertical ladder to be ascended to a point where the platform without a railing or line for support is behind and beyond an opening 31 feet deep. To hold that a railing to grab, or a safety device in the nature of a guard line or similar hand-hold, must be the subject of testimony by a naval architect, is equivalent to a holding that a jury is not fit to pass on simple issues of obvious danger in any case. This is the sense of the dissent herein and the common sense of the matter.

The basic rules in the use of expert testimony are clearly ignored by the majority opinion below. They are set forth in a leading text on the subject, Rogers, *The Law of Expert Testimony*, 3rd Ed., 1941, Matthew Bender, Inc., Albany, N. Y., at pp. 50, 51, as follows:

> "Within the rule excluding such evidence are ordinary standards of conduct of safety or danger, the operation of well known natural laws and the existence of social customs . . . If the facts can be placed before a jury and are of such a nature that jurors generally are just as competent to form opinions in reference

> to them and draw inferences from them as witnesses, the opinion of experts cannot be received. The fact that the expert witness may know more of the subject and better comprehend and appreciate it than the jury is not sufficient to warrant the introduction of his testimony".

See *Schillie* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 222 F. 2d 810, 814, that:

> "The determination of its admissibility is largely within the discretion of the trial court under the peculiar circumstances of each case."

Decisional references to the need for and feasibility of construction of simple railings or guard-lines around open holes, particularly for deep openings on merchant vessels, necessarily prompt the conclusion that the obvious danger in the instant case was within a jury's province to determine "ordinary standards of conduct of safety or danger", supported by the testimony of Terry, Tribble, Richards and others who testified from their immediate experience and expertise on the particular factual situation involved, which testimony was supplemented by photographs and diagrams.

In *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. C. A. 2d, Dec. 1925), Learned Hand, *C.J.*, wrote that a seaman ordered upon deck cargo without being provided a guard line was deserving of jury determination without an expert's opinion, as follows:

> "Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the defendant on this issue,

as well as on the issue of the absence of the line" (p. 48 of 10 F. 2d).

Augustus N. Hand, *C.J.*, in *Kennair* v. *Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (C. C. A. 2d, June 1952) held for a seaman who fell through an unlighted elevator shaft, by affirming a jury verdict predicated on the absence of an indicator or other device on deck to show where the elevator was at a given time. A similar contention to that involved herein was answered as follows:

> "It is urged by the defendant that there is no evidence in the record as to what type of safety device a reasonably prudent shipowner would have, nor any evidence as to what precautions were taken on other vessels. But such evidence was not necessary; for it was the function of the jury to apply the standard of care—what was reasonable under the circumstances—to the facts presented to it. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 353, 63 S. Ct. 1062, 87 L. Ed. 1444" (p. 606 of 197 F. 2d).

To require a marine architect to testify on the need for and construction of a railing or the placement of a life line at and about an unilluminated hole, 31 feet deep, through which a person's body could and did fall, is to drastically reduce the fact-finding function of a jury in a seaman's case. Cases are legion on the inviolability of a federal jury's function and need not be cited. See: *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6, 11 (Nov. 7, 1960); *Schultz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

This Court in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 98, 64 S. Ct. 455, held that "A finding of seaworthiness

is usually a finding of fact", and at p. 104 related it to "supply and keep in order the proper appliances appurtenant to the ship". On the basis of the majority reasoning below in the instant case, a defective rope or cable should not prompt liability unless there be testimony by an expert that there is need for an adequate one that could "feasibly" be manufactured. Such result is no less strained than that related to a railing or line on a platform adjacent to a man-size opening in the enclosed radar tower.

Clark, *C.J.*, in *Krey* v. *U. S.* (C. C. A. 2d, Dec. 1941), 123 F. 2d 1008 at p. 1010, pertinently held on the absence of any handle or rail in a ship's shower-room while the vessel was in port, much less dangerous than the instant factual situation, as follows:

> "Viewed as a shower to be used at sea, the absence of any sort of handle or rail for support is alone almost enough to condemn it."

As the absence of a railing or similar device was held to be a simple issue and clearly unsafe in the cases cited above, without the need for an expert to tell the obvious, then how much more unnecessary is an expert where the absence of any rail or line is in the context of a speeding vessel at sea, the radar tower subject to excessive vibration, compounded by the long inadequate and then foreseeable total absence of any illumination?

The Supreme Court in *Milwaukee & St. P. R. Co.* v. *Kellog,* 94 U. S. 469, affirming 5 Dill. 537, 1 Cent. Law J. 278, long ago expressed the maxim that experts are not permitted to state their conclusions where the subject of proposed inquiry is a matter of common observation upon which the lay or uneducated mind is capable of forming a judgment. This principle was recently reaffirmed by Mc-

Nally, *J.*, in *Clark* v. *Iceland Steamship Company, Ltd.*, 179 N. Y. S. 2d 708, 6 A. D. 2d 544 (App. Div. 1st Dept., Nov. 1958), holding that opinion evidence was inadmissible as to adequacy or inadequacy of ship construction related to the absence of a life line between stowed hatch covers and the ship's rail. He wrote that seaworthiness is generally a jury question, not to be tempered by an expert's opinion, where the need of a life line was so clearly within the "ken of the experience, observation and knowledge of laymen" (p. 714 of 179 N. Y. S. 2d). Plaintiff's verdict was therefore reversed on the very ground that would have affirmed it in the instant case.

See: *Desrochers* v. *United States*, 105 F. 2d 919, 920 (C. C. A. 2, July 1939).

The obvious liability following failure to provide a handhold or rail was expressed by Dawson, *D.J.* in *Campbell* v. *Tidewater*, 141 F. Supp. 431 (U. S. D. C., S. D. N. Y., June 1956), citing *Schirm* v. *Dene Steam Shipping Co.*, 222 F. 587 as follows:

> "If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then, of course, he must have a handrail, or something else extending above the ladder, to hold on" (p. 435 of 141 F. Supp.).

See: *The Leontios Teryazos*, 45 F. Supp. 618, 622, the Court stating:

> "A ship should not be regarded as seaworthy unless there is some protective means to prevent its employees from falling down into the bunker. To hold otherwise would be a return to the dark past when little protection was afforded men of the sea."

It was the burden of respondent to establish instead that the construction of a railing or other safety device on an indoor platform would not be "feasible" from the standpoint of naval architecture. This it did not do. There is neither a complex issue nor any reason to support the need for expert testimony on this subject by either side. The issue is not on the sufficiency of evidence *per se*, as the Court of Appeals stated there was substantial evidence sufficient to support a judgment. The issue is whether a lay jury could understand this substantial evidence without the refined explanation by a self-styled expert. If this be so, respondent failed to substantiate its own defense, and contention on appeal as to the non-feasibility of construction of a railing or other safety device. It did not except on any question related to expert testimony, as none was raised. As there was no expert offered by either side, obviously the evidence submitted without being tempered by such testimony should be deemed sufficient to support the instruction on railings or other safety devices.

In this light petitioner respectfully refers again to the dissenting opinion below, particularly where reference is made to the feasibility of constructing a railing on an indoor platform (which also means to provide a simple life line as used on every vessel); and that the burden to show such a simple undertaking could not be done should properly devolve on the shipowner. See: *The Pennsylvania*, 86 U. S. 125; *Mason* v. *Lynch Brothers Company*, 228 F. 2d 709, 712; *Hill, Jr.* v. *Atlantic Navigation Company*, 218 F. 2d 654. In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, this Court held that the burden was upon the one setting up a seaman's release to establish the facts concerning its validity. Its parallel to the feasibility of constructing a railing in the vibrating 65-foot hollow aluminum radar mast is apparent.

As a result of the general verdict petitioner established the negligence of respondent and the unseaworthiness of its vessel. Respondent did not offer evidence or support its defense on the adequacy of the crow's nest platform and lights. It is unquestioned that all the lights were out when petitioner slipped and fell, and that he slipped and fell because of the multiple dangers known to respondent's responsible officers and crew-members. Respondent was bound by all issues submitted and the jury verdict was conclusive on all issues raised by the pleadings and submitted to the jury.

Where the conditions are aggravated by the absence of illumination, then the cases are even stricter on a shipowner with respect to the clear and simple requirement of a handrail or similar device. In *Read* v. *United States*, 201 F. 2d 758 (C. C. A. 3, February 1953), on the allegations of failing to provide sufficient lighting facilities and also to provide safeguards around the open deep tanks, solely on the issue of defective lighting appliances it was held there was a "failure to supply and keep in order the proper appliances appurtenant to the ship" so as to prompt unseaworthiness.

Also in point is *Johnson* v. *Griffiths S.S. Co.*, 150 F. 2d 224 (C. C. A. 9, June 1945), where the body of a seaman was found in an open hatch under conditions of poor visibility, and other dangers, including pitching of the vessel. Under these circumstances the Court held as follows:

> "It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury . . . Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to

> the injury in this case as to impel the conclusion that it was the proximate cause of the death" (p. 226 of 150 F. 2d).

Rhetorically, need a naval architect testify on the construction of a simple railing, or easy placement of a line, where a hypothetical question must include the facts of pitching, vibration, the 31-foot hole and the absence of any illumination? The issue is simple and the answer obvious.

By incorporating the FELA, 45 USC 51 *et seq.*, into the Jones Act, the following holding by this Court in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, is pertinent:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (p. 506 of 352 U. S.).

In accord:

Ferguson v. *Moore-McCormack Lines, Inc., supra.*

In *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431, 59 S. Ct. 262, this Court expressed its liberal interpretation of the Jones Act, stating that seamen were "wards of the admiralty." Accord therefore should be given to the jury's verdict on the issues submitted under the Jones Act and related unseaworthiness causes of action. See *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854.

POINT II

The issue of future maintenance was properly left to the trial judge by the parties and his exercise of discretion as a fact-finder in favor of petitioner was not clearly erroneous, nor does any decision by this Court hold that "no payments should be made for future maintenance and cure". The reversal herein is part of a new approach by the Court of Appeals for the Second Circuit to debilitate the fact-finding functions of courts and juries.

It is apparent that the fabric of maritime law as it pertains to maintenance for a seaman is severely disrupted by the majority opinion. Without any basis in a definitive ruling by this Court the majority below concludes that ". . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure." The reference to Mr. Justice Jackson's opinion in *Farrell* v. *U. S.*, 336 U. S. 511, 69 S. Ct. 707, is inapposite to the instant facts and taken out of context.

Despite the trial Court's proper exercise of discretion in awarding future maintenance, in tandem with the heretofore respected and traditional province of trial Courts in the admission or exclusion of expert testimony, he was reversed without reference to the principle on review expressed in *McAllister* v. *U. S.*, *supra*. Is this not a continuation of a new approach, without sanction by this Court, expressed for non-jury cases in *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, whereby the Court of Appeals for the Second Circuit held that its scope of review is expansive to the extent that it may review the evidentiary basis of findings and conclusions, "Despite possible negative inferences that might have been drawn from *McAllister* v.

United States, 348 U. S. 19 (1954)" (p. 355 of 286 F. 2d)? This is consistent with the same Court's dilution of the jury's fact finding function in *Martin* v. *United Fruit Co.*, 272 F. 2d 347, *Fatovic* v. *Nederlandsch etc.*, 275 F. 2d 188 (the latter two cases on the proposition that a naval architect was required on issues of adequacy of ship's equipment related to a light and a boom); *Dagnello* v. *The Long Island Railroad Co.*, March 24, 1961 (not yet officially reported), —— F. 2d. —— (that the Court of Appeals may review an alleged excessive jury verdict despite the trial Court's denial of a motion for reduction); *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355 (that a jury need not be specifically instructed on pertinent principles of maritime law).

The issue on maintenance was withheld from the jury in strict compliance with the conditions expressed by the same Court in *Bartholomew* v. *Universe Tankships Inc.*, 279 F. 2d 911. Reversal herein is predicted, however, on an improper standard in reviewing the medical evidence. See: *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 80 S. Ct. 173.

There is no room to cite the many cases on future awards for maintenance on the reasoning expressed in Gilmore and Black, *The Law of Admiralty*, The Foundation Press, Inc., 1957, p. 268, as follows:

> "The amount awarded for maintenance lies largely in the discretion of the trial judge."

When maintenance ends is a question of fact to be determined on the basis of the evidence presented. *Ziegler* v. *Marine Transport Line*, 78 F. Supp. 216; *Jones* v. *Waterman Steamship Corp.*, 155 F. 2d 992. With respect to the principle of *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, 58 S. Ct. 651, there is recognition that future lump

sum payments can be made "*in the discretion of the Court*, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained" (pp. 531 and 532 of 303 U. S., italics supplied). That the *Calmar* decision was not meant to limit an award for future maintenance was discussed in *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840, and also in *Loverich* v. *Warner Co.*, 118 F. 2d 690, by the Court of Appeals for the Third Circuit. The advantage and consistency of lump sum payments is expressed in Gilmore and Black, *The Law of Admiralty*, *supra*, on page 266 as follows:

> "It follows that the seaman may bring successive suits and that a prior recovery will not bar a subsequent action. Usually of course, even in a disputed case, one trip to the courts will settle the issue for the parties, and no instance has been found of a maintenance and cure claimant actually bringing more than one action against the same employer."

This text also discusses the leading maintenance cases on pages 264 and 265 and points out that there can be a distinction where the ship's fault prompted the injury, as contrasted with a shoreside accident to a seaman on shore leave, where the maintenance items are not duplicated in the damage action, as in the instant case. Certainly a pre-existing illness or a shoreside accident to a seaman on furlough cannot be compared to the instant accident and causally related disabilities.

With respect to the period of future maintenance, a conservative estimate of three years, in *Muruaga* v. *United States, et al.*, 172 F. 2d 318, the Court stated as follows:

> "What allowances in money for maintenance and cure in addition to hospitalization and treatment actually

> furnished have been made in other cases and the time periods on which those allowances have been based are irrelevant. Each case is to be decided on its own established facts" (p. 321 of 172 F. 2d).

In accord:

> *Brown* v. *Dravo Corp.*, 258 F. 2d 704.

In light of the above, it is apparent that comparing petitioner's past inability to attain the maximum benefits of medical attention with what he can reasonably expect in the future, the extent of the injuries; that petitioner is still an outpatient for rehabilitation, a former alien, now an American citizen capable only of performing sedentary work beyond his training and experience as a seaman, that the award for three years was eminently fair and conservative. A further consideration, as expressed in Gilmore and Black, *supra*, is that our courts should not be congested by periodic and frequent actions for maintenance which could be readily disposed of in one determination.

CONCLUSION

On a full appreciation of the record as a whole, to set right a miscarriage of justice that will adversely affect all maritime cases, petitioner respectfully prays that a Writ of Certiorari be granted and/or that this Honorable Court summarily reverse the Court below on both or either of the causes presented herein.

Respectfully submitted,

PHILIP F. DICOSTANZO
Attorney for Petitioner

Dated: Brooklyn, New York
July , 1961

ROBERT KLONSKY
HERMAN N. RABSON
On Petition

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued May 10, 1961 Decided June 9, 1961.)

Docket No. 26875

No. 385—October Term, 1960.

JAMES VICTOR SALEM,

Plaintiff-Appellee,

—v.—

UNITED STATES LINES COMPANY,

Defendant-Appellant.

Before:

FRIENDLY and SMITH, *Circuit Judges,*
and WATKINS, *District Judge.**

Appeal by defendant United States Lines Company from judgment for plaintiff in the Southern District of New York, Willis W. Ritter, *J.*, on a general jury verdict based on negligence and/or unseaworthiness and an award of future maintenance and cure by the court. Reversed and remanded.

WALTER X. CONNOR, New York City (Kirlin, Campbell & Keating, and James P. O'Neill, New York City, on brief), *for appellant.*

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* United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

ROBERT KLONSKY, Brooklyn, New York (Herman N. Rabson and DiCostanzo, Klonsky & Sergi, Brooklyn, New York, on brief), *for appellee.*

WATKINS, *District Judge*:

This is an appeal from an action wherein plaintiff-appellee sought recovery for injuries sustained while he was employed as an able bodied seaman on a vessel owned and operated by defendant-appellant. The action was based on allegations of negligence, unseaworthiness, and right of maintenance. Defendant appeals from a judgment against it totalling $123,968.00, plus costs, made up of the following elements: (1) A general jury verdict for $110,000.00 damages for personal injuries due to negligence and/or unseaworthiness; (2) A maintenance award by the court for $13,968.00, including $8,760.00 for three years future maintenance, and $5,208.00 for past maintenance. Appeal is also taken from the order denying defendant's motion to set aside the verdict, for judgment for defendant *non obstante veredicto,* and for a new trial.

We feel this case must be reversed on two grounds: first, because of an erroneous and prejudicial instruction given by the trial judge; and second, because of a lack of evidence to support the trial judge's finding of three years future maintenance.

Appellee was an able bodied seaman on board the luxury liner S.S. United States. His principal duty on board was to act as lookout. He reported for duty at 12:00 midnight on the night of February 16, 1958, to his post in the crow's nest. The crow's nest is a lookout post located within the ship's radar tower, a hollow aluminum mast which supports the ship's radar screens. At various levels

within the radar tower, are platforms, reached by a steel ladder running from the bottom of the radar tower to the top, a distance of some sixty-five feet. The platform which led to the crow's nest was some thirty-one feet above the deck. There were five electric lights within the tower, two below the crow's nest level, one approximately at the level of the crow's nest, and two higher in the tower.

When plaintiff reported for duty at midnight, all the lights were out except the one at the crow's nest level. He left the crow's nest at 2:00 A. M. on Monday, February 16, having stood two hours of his four-hour watch, and having been relieved at this time by a fellow seaman, one Richards. The accident complained of occurred when he was returning to duty at 2:30 A. M. At that time there was still only one light burning in the tower, the one at the level of the crow's nest. Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform. He saved himself from a further fall down through the tower by holding on to the ladder rungs. He then called for help, and Richards came to his aid from the crow's nest. Richards pulled him up to a sitting position on the platform, and asked him three or four times, "Can you hold yourself until I make a phone call?" Plaintiff finally answered, "Yes, I guess so." Richards then placed plaintiff on a narrow ledge with both feet dangling into the open space, with his arm around a pipe casing. Richards left to enter the crow's nest to telephone the bridge. Plaintiff then became dizzy, called

out for help again, but was not heard, and fell for the second time, losing consciousness. He fell to a point about eight feet below the crow's nest platform, where he was rescued by men with flashlights.

The complaint contained four causes of action, based on:

1. The negligence of defendant and its employees (Jones Act, 46 U. S. C. §688).
2. Negligence on the part of Richards, in that, while attempting to rescue plaintiff, he caused plaintiff to have a second fall.
3. The unseaworthiness of the vessel.
4. Recovery for past and future maintenance.

The trial judge instructed the jury among other things that their verdict should be for the plaintiff, "if you find the defendant was negligent in failing to provide railings or other safety devices." Due exception was taken to this and other portions of the charge.

There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy. Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testi-

mony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices?

In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence. In *Martin* v. *United Fruit Co.*, 2 Cir. (1959), 272 F. 2d 347, a case involving a seaman injured aboard ship while attempting to open an air port, the plaintiff contended on appeal that the trial judge had erred in failing to present an issue to the jury. In a *per curiam* opinion, affirming judgment for defendant, at page 349, this court stated:

> "Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was introduced, it was correct to exclude this matter from the jury's consideration."

The case of *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maastchappij*, 2 Cir. (1960), 275 F. 2d 188, involved a seaman injured when struck in the hip by a cargo boom while working as a stevedore on the S.S. Veendam. The trial judge charged the jury that there were five separate theories upon which the jury might find the ship unseaworthy. One of these theories was the absence of a stopping arrangement to prevent the boom's swinging

against the kingpost. This court, in reversing judgment for the plaintiff, found that there was no evidence in the record to support this theory of unseaworthiness, and, at page 190, stated:

> "In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. Martin v. United Fruit Co., 2 Cir., 272 F. 2d 347. Since there was no expert testimony on the matter, it should not have been submitted to the jury."

There is another error in this case which we feel requires reversal, and that is the finding of the court as to future maintenance. The trial judge properly withheld the question of maintenance from the jury in compliance with the conditions expressed by this court in *Bartholomew* v. *Universe Tankships Inc.*, 2 Cir., 279 F. 2d 911. There is no dispute here as to past maintenance, the sum of $5,208.00 being agreed upon by both parties. The trial court awarded future maintenance computed on the basis of a period of three years at $8.00 per day. The lump sum award for future maintenance was $8,760.00.

The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Graubard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period.

The two principal Supreme Court cases on the problem are *Calmar Steamship Corp.* v. *Taylor,* 303 U. S. 525, and *Farrell* v. *United States,* 336 U. S. 511. In the *Calmar* case, the trial court had awarded a lump sum payment for maintenance to a seaman suffering from Buerger's Disease. The payment was based on the life expectancy of the seaman as the disease was confidently predicted to be incurable. The key language of the court is as follows:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of the maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

The language of the court, "immediate future" and "definitely ascertained" would militate in favor of a rather restricted area in which payments for future maintenance might properly be awarded.

The result in *Farrell* further strengthens this interpretation. There the court held that maintenance and cure payments would only be required until such time as the seaman was *cured or was found to be incurable.* (Emphasis added.) The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease. Whatever the respective merits of a lump sum payment as

against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure. Justice Jackson strongly hinted at this result in *Farrell*, at page 519:

> "The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement.

Defendant makes two other points which we feel should be discussed here since this case is being remanded for a new trial:

1. A claim of absolute bar to recovery because of plaintiff's negligence.
2. The contention that defendant was not responsible for Richards' actions in attempting to rescue plaintiff.

Concerning the first point, the trial judge charged the jury that as a seaman, plaintiff does not assume the risk of an unsafe place to work and cannot be blamed for working in an unsafe place. There was no error in this instruction. *Darlington* v. *National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817. A seaman assumes no risk of employment even of obvious dangers when he acts under the orders of a superior officer. *Becker* v. *Waterman Steamship Corp.*, 2 Cir., 179 F. 2d 713. As to the issue of whether plaintiff should have called someone to replace the burned out lightbulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues

where there is evidence to sustain the finding below. There is such evidence in this case.

As to point number two, we feel that Richards' employer, defendant herein, was responsible for the actions of Richards in attempting to rescue plaintiff. See Judge Soper's opinion in *Harris* v. *Penn. R.R. Co.*, 4 Cir., 50 F. 2d 866, 868; *Buckeye Steamship Co.* v. *McDougal*, 6 Cir., 200 F. 2d 558, cert. den. 345 U. S. 926, affirming 103 F. Supp. 473. Defendant cites the case of *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679, to the effect that a seaman, voluntarily assisting another seaman in distress is not acting within the scope of his employment, unless the rescue is authorized by the employer. That case is readily distinguishable from the case at hand. In the *Robinson* case, an intoxicated seaman, returning to his vessel from shore leave, was run over by a locomotive within a customs compound adjacent to the dock. The locomotive and the customs compound were not owned or controlled by the shipowner. The court in that case was careful to limit its holding to the facts; where the accident occurred not on the ship, but on land. We do not think the law in that case applies to rescue situations occurring aboard ship where the seaman being rescued is injured while performing his duties.

We think the correct law applicable to this case to be that the shipowner owes an obligation to effect prompt and proper rescue to a seaman injured in the performance of his duties aboard ship, and that a seaman who undertakes such a rescue is acting within the scope of his employment, the employer being liable for his actions if the rescue operation is conducted negligently.

Since we have found prejudicial error in the charge to the jury, we conform to the language in *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, supra*:

> "Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

The judge could have insulated the error in the charge recited by submitting special interrogatories, as is frequently done in such cases, but he chose not to do so.

In view of our conclusion that there must be a new trial, we believe it unnecessary to discuss the many other errors complained of.

Reversed and remanded for a new trial consistent with the foregoing opinion on the issues of negligence, unseaworthiness, and future maintenance. Affirmed as to past maintenance award in the sum of $5,208.00.

SMITH, *Circuit Judge* (concurring in part and dissenting in part):

I concur in the reversal of the award for future maintenance and cure, for the reasons stated in the opinion. I also agree with the opinion on assumption of risk and responsibility for the fellow seaman's rescue attempt.

From so much of the judgment as reverses the jury award for unseaworthiness or negligence, I respectfully dissent. As the majority points out, the crow's nest was more than thirty feet above the ship's deck with access to the outdoor lookout post obtainable through an internal radar tower. The straight ladder ascending the radar tower faced 180° away from the platform leading out to the crow's nest; reaching the platform entailed the rather dangerous maneuver of transferring one foot at a time from the ladder while turning the body completely around. There was before the

jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or hand hold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.

I do not believe that either the *Martin* or the *Fatovic* case stands for the blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of "naval architecture" may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture,[1] such as may be required to determine proper construction of deadlights, or the feasibility of a stopping arrangement to prevent a boom from swinging against a kingpost. I would approve the charge on railings or other devices and affirm the award for personal injuries and past maintenance.

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1 It is somewhat difficult to conceive in what way the construction of railings on an indoor platform would not be "feasible" from the standpoint of naval architecture. If such were the case, however, it would seem more sensible to have the defendant introduce such evidence.